Supreme Court
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92-1636
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

RICHARD N. BOWMAN,
Petitioner,

vs.

WESTERN AUTO SUPPLY, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Date: April 9, 1993

QUESTION PRESENTED

Does a person who alleges his discharge from employment was an overt act of a conspiracy prohibited by RICO, 18 U.S.C. § 1961, et seq., have standing to bring a cause of action against his employer under RICO for economic loss and injury.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Richard N. Bowman and the respondents Western Auto Supply Company and John R. Leach.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

RICHARD N. BOWMAN,
Petitioner,

vs.

WESTERN AUTO SUPPLY COMPANY, et al,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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The petitioner, Richard N. Bowman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, App. 1-App. 15) is reported at 985 F.2d 383 (1993). The opinion of the United States District Court for the Western District of Missouri (App., *infra*, App. 16-App. 29) is reported at 773 F.Supp.174.

JURISDICTION

The United States District Court for the Western District of Missouri entered its judgment on August 16, 1991, denying the motion of defendants Western Auto Supply Company (hereinafter "Western Auto") and John Leach to dismiss plaintiff Bowman's complaint on numerous grounds, including plaintiff's lack of standing to pursue any claim under RICO, 18 U.S.C. § 1961, *et seq.* 773 F. Supp. 174. On November 26, 1991, the District Court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question of plaintiff's standing to pursue a claim under RICO. On January 7, 1992, the United States Court of Appeals for the Eighth Circuit granted Western Auto and Leach permission to appeal. On January 29, 1993, the Eighth Circuit reversed the District Court's denial of the motion of Western Auto and Leach to dismiss, holding that plaintiff Bowman lacked standing under RICO to bring a cause of action. On March 30, 1993, the Eighth Circuit denied plaintiff Bowman's timely filed petition for rehearing and suggestions for rehearing en banc. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

§ 1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one

year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transaction), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transaction in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), section 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts),

section 2341-2346 (relating to trafficking in contraband cigarettes), section 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and

do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT

Plaintiff Richard Bowman was employed by defendant Western Auto on October 23, 1985, to manage retail advertising. During the period of his employment Western Auto's president was defendant John R. Leach. Plaintiff Bowman was fired by Western Auto on August 22, 1986.

On August 20, 1990, plaintiff Bowman filed a complaint in the United States District Court for the Western District of Missouri, and on September 27, 1990, he filed a first amended complaint in the same court. In his first amended complaint plaintiff Bowman alleged defendants Western Auto and Leach conspired to conduct a scheme and conducted a scheme known as double billing or double dipping by which Western Auto merchandise suppliers were fraudulently billed for advertising and promotional services that were never provided by Western Auto. Plaintiff Bowman further alleged he was fired by Western Auto and Leach in order to protect and further their conspiracy to commit fraud by double billing merchandise suppliers for advertising. Finally, plaintiff Bowman alleged the conduct of defendants Western Auto and Leach violated RICO and had caused him direct economic loss and injury. The jurisdiction of the District Court was invoked under RICO, 18 U.S.C. § 1964(c).

On October 9, 1990, defendants Western Auto and Leach filed a motion to dismiss plaintiff Richard Bowman's first amended complaint, relying on numerous grounds including lack of standing under RICO. On August 16, 1991, the District Court denied defendants' motion to dismiss, but on November 26, 1991, the District Court certified for interlocutory appeal to the United States Court of Appeals for the Eighth Circuit the question of whether plaintiff Bowman had standing under RICO to recover damages for his discharge.

On January 29, 1993, the Eighth Circuit entered its judgment reversing the District Court's finding that plaintiff Bowman had standing to bring a claim for his discharge under RICO. The majority of the panel, Judges Hansen and Ross, held that "standing to bring a civil suit pursuant to 18 U.S.C. § 1964(c) and based on an underlying conspiracy violation of

18 U.S.C. § 1962(d) is limited to those individuals who have been harmed by a § 1961(1) RICO predicate act committed in furtherance of a conspiracy to violate RICO." *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993). In his dissent, Judge Heaney, stated, "Though I agree [with the majority] that RICO has been used more widely than Congress contemplated and than is desirable, that sentiment does not support the holding that, as a matter of law, an employee fired in furtherance of a conspiracy to commit one of the prohibited predicate acts has no standing to sue under RICO." *Id.* at 389.

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE

I.

The Circuit Courts Of Appeals Have Not Applied A Uniform Standard To Determine When A Whistleblower Plaintiff Has Standing To Bring A Cause Of Action Under RICO.

Review should be granted because this case presents the important question of whether a whistleblower who has been fired as part of a conspiracy by his employer that violated RICO has standing to bring a cause of action under RICO against the employer for economic loss and injury. The circuit courts of appeals have not applied a uniform standard to determine when a person who alleges he was fired by his employer as part of a conspiracy prohibited by RICO has standing to bring a cause of action under that statute.

The First, Second, Ninth, and, now, Eighth Circuits require that plaintiff allege injury by a predicate act listed in § 1961(1) in order to have standing for a claim based on a violation of § 1962(d). See *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991) ("An actionable claim under § 1962(d), like one under § 1962(c), requires that the complainant's injury stem from a predicate act within the purview of 18 U.S.C. § 1961(1)"); *Reddy v. Litton Industries*, 912 F.2d 291 (9th Cir. 1990) (Conspiratorial act that causes the injury must be a predicate act as defined in § 1961 in order to satisfy standing requirement of civil RICO provision.); *Hecht v. Commerce Clearing House*, 897 F.2d 21 (2d Cir. 1990).

The Third and Seventh Circuits take a contrary position, holding that as long as the discharge was an overt act done in furtherance of a conspiracy in violation of § 1962(d), standing does not require injury by a predicate act listed in § 1961(1). See *Shiffels v. Kemper*, 978 F.2d 344, 350 (7th Cir. 1992) (Plaintiff who "alleges an injury to her business or property proximately caused by an overt act in furtherance of a conspiracy to violate RICO, even though the overt act is not a predicate act required in a RICO pattern," has standing.); *Sherin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3rd Cir. 1989) ("[E]ither racketeering activity or classic over conspiracy acts may qualify as 'predicate acts' to a RICO violation that causes injury.")

This case presents the Court with the opportunity to address the split in the circuit courts on the important issue of whether an employee who stands up against an employer's criminal conduct and is fired as part of the conspiracy to continue the conduct, has standing under RICO to recover for direct economic loss and damages caused by the discharge. At stake is whether § 1962(d) conspiracy claims will be eviscerated by imposing the requirement that there be injury by a § 1961(1) predicate act and thereby limiting RICO claims to violations of § 1962(a) - (c). By denying whistleblowers such as plaintiff Bowman standing to sue under RICO, the Eighth Circuit has left employers engaged in criminal conduct free to fire or threaten employees with discharge as a means of coercing their continued silence. Employees who are victims of such overt acts of a RICO conspiracy are left without a remedy.

II.

The Seventh And Eighth Circuits Have Taken Divergent Approaches To The *Holmes* Proximate Cause Standard

In *Holmes v. Securities Investor Protection Corp.*, _____ U.S. _____ 112 S.Ct. 1311 (1992), this Court adopted a proximate causation standard for standing to sue under § 1964(c). In its opinion in this case the Eighth Circuit acknowledged the *Holmes* proximate cause standard, but then ignored it and adopted as the sole test of standing whether the plaintiff alleges injury by a § 1961(1) predicate act. *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 387-88 (8th Cir. 1993).

In *Shiffels v. Kemper*, 978 F.2d 344, 350 (7th Cir. 1992), the Seventh Circuit applied the *Holmes* proximate cause standard by analyzing the facts to determine whether a RICO conspiracy was the proximate cause of the plaintiff's damages. It held that a whistleblower, similarly situated to plaintiff Bowman, may have standing to sue under § 1964(c). Applying the proximate cause standard, the Seventh Circuit found that an employee directly injured by a discharge, which was committed to further the employer's conspiracy and was directly related to the goals of the conspiracy, may have standing under RICO. *Id.* The Seventh Circuit went on to find that the "injured employee [was] well within the zone of interests RICO is meant to protect." *Id.* Finally, the Seventh Circuit recognized that "RICO, which grants standing to anyone injured in his business or property 'by reason of' a RICO violation, prohibits conspiracies, which do not require commission of any predicate offenses." *Id.*

This case presents the Court with the opportunity to address the issue of whether for claims based on a violation of § 1962(d), the *Holmes* proximate cause standard requires a

factual and legal analysis, such as the Seventh Circuit performed in *Shiffels*, or, as held by the Eighth Circuit in this case, *Holmes* requires no more than determining if the plaintiff has alleged injury by a § 1961(1) predicate act. *Holmes* was the first step in this court's exposition of the application of a proximate causation standard for RICO. In this case, the Eighth Circuit has applied the proximate causation standard erroneously and as a practical matter eliminated all claims based on violations of § 1962(d). Nowhere in the deliberations of Congress, the language of the RICO statute, or the decisions of this Court is there any ground for judicially prohibiting RICO conspiracy claims unless the plaintiff also alleges injury by a § 1961(1) predicate act. Review of the Eighth Circuit's judgment in this case will permit the Court to apply its proximate causation standard to RICO conspiracy claims and prevent judicial deletion of § 1962(d) from the statute.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 9, 1993

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 92-1050WM

Richard N. Bowman,

Appellee,

v.

Western Auto Supply Company and John Leach,

Appellants.

Appeal from the United State District Court for the Western District of Missouri.

[PUBLISHED]

Submitted: September 18, 1992
Filed: January 29, 1993

Before HANSEN, Circuit Judge, HEANEY and ROSS, Senior Circuit Judges.

HANSEN, Circuit Judge.

Richard Bowman ("Bowman") filed a suit against Western Auto Supply Company and John Leach (collectively "Western Auto") pursuant to the civil action provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that he was discharged from his employment for speaking out against Western Auto's alleged RICO violations. Western Auto moved to dismiss on the grounds that Bowman lacked standing to bring a civil RICO suit. The district court denied Western Auto's motion and certified the issue for appeal. We now reverse.

Richard Bowman was an employee of Western Auto Supply Company when he allegedly discovered that the company was "double billing" its merchandise suppliers by charging them for advertising and promotional services they never received. On August 22, 1986, Bowman was discharged from his job. On August 20, 1990, he filed this suit, seeking recovery pursuant to RICO's civil action provision contained in 18 U.S.C. § 1964(c). He contended that his discharge came because he protested, spoke out against, and criticized his employer's allegedly fraudulent scheme. Specifically, he alleged that he was injured as a result of Western Auto's violations of 18 U.S.C. § 1962(a), (b), (c), and (d).

Western Auto filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), taking the position that Bowman lacked standing to bring a § 1964(c) civil RICO suit because any injuries he sustained as a result of being discharged from his employment were not a result of RICO activity. The district court denied the motion but granted Western Auto's motion to certify the issue for interlocutory appeal. On appeal, Bowman contends that he has standing to sue based on injuries arising from both alleged substantive violations of RICO as delineated in 18 U.S.C. § 1962(a), (b), and (c), and an alleged conspiracy to violate RICO as prohibited in 18 U.S.C. § 1962(d).

We review de novo the district court's denial of Western Auto's motion to dismiss. See Klett v. Pim, 965 F.2d 587, 589 (8th Cir. 1992) ("The complaint must reveal an insuperable bar to relief to warrant a Rule 12(b)(6) dismissal," and such a dismissal is subject to de novo review.).

II.

RICO contains a civil enforcement scheme that permits private individuals harmed by criminal RICO activity to recover civil damages. The Act provides as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). This provision confers standing on any individual who has experienced injury to his or her business or property that occurred "by reason of" a RICO violation.[1] At issue in this appeal is whether Bowman's alleged injuries resulted from a RICO violation such that he has standing to bring a suit for civil damages against his employer.

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[1]RICO violations are found in 18 U.S.C. § 1962. Specifically, section 1962(a) makes it "unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . such income . . . in acquisition of . . . any enterprise which is engaged in . . . interstate . . . commerce." Section 1962(b) makes it "unlawful for any person through a pattern of racketeering activity . . . to acquire . . . any interest in . . . any enterprise which is engaged in . . . interstate . . . commerce." Section 1962(c) makes it "unlawful for any person . . . associated with any enterprise engaged in . . . interstate . . . commerce [ ] to . . . participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." Section 1962(d) makes it "unlawful for any person to conspire to violate . . . (a), (b), or (c) of this section." 18 U.S.C. § 1962.

Section 1961(1) of RICO defines racketeering activity, in part, as "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year," or "any act which is indictable under [a variety of] provisions of title 18, United States Code." 18 U.S.C. § 1961(1).

III.

Although this court has not before been presented with this issue, the circuit courts that have are in agreement that an employee discharged for criticizing or refusing to participate in the employer's racketeering activity lacks standing to bring a civil suit when the underlying violation is based on section 1962(a)-(c) of RICO. See Kramer v. Bachan Aerospace Corp., 912 F.2d 151 (6th Cir. 1990) (Because his injuries were a result of being fired, not of RICO violation, plaintiff discharged after reporting employer's RICO scheme lacked standing to bring suit.); Reddy v. Litton Industries, Inc., 912 F.2d 291 (9th cir. 1990), cert. denied, _____ U.S. _____, 112 S. Ct. 332, 116 L. Ed. 2d 272 (1991) (Employee discharged for refusing to participate in cover-up of illegal scheme lacked standing to recover under § 1962(a) and (c).); O'Malley v. O'Neill, 887 F.2d 1557 (11th cir. 1989), cert. denied, 496 U.S. 926 (1990) (Plaintiffs lacked standing to bring civil RICO action because their injuries were caused by the decision to fire them, not by RICO activity.); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d cir. 1989) (Plaintiff discharged to prevent her from reporting fraudulent scheme lacked standing to pursue civil RICO suit for alleged violations of § 1962(a) and (c) because her injury was not a result of a predicate act.); Burdick v. American Express Co., 865 F.2d 527 (2d cir. 1989) (per curiam) (Plaintiff who complained of and refused to participate in corrupt activity was injured as a result of employer's decision to fire him, not as a result of predicate RICO act, and thus lacked standing.); Cullom v. Hibernia National Bank, 859 F.2d 1211 (5th Cir. 1988) (Plaintiff discharged for refusing to participate in fraudulent activity lacked standing to recover under civil RICO, as injury resulting from discharge did not flow from RICO predicate acts.); Nodine v. Textron,

Inc., 819 F.2d 347 (1st Cir. 1987) (Plaintiff fired for reporting employer's illegal scheme lacked standing to bring civil RICO suit).

We agree with the weight of the authority. The Supreme Court has held that in order for a litigant to establish standing to bring a suit under § 1964(c) of RICO, the injury alleged must be a result of a violation of § 1962. Sedima S.P.R.L. v. ImRex Co., 473 U.S. 479 (1985). In that opinion, the Court stated as follows:

> A violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. . . . [T]he plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." Haraco, Inc. v. American National Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (1984), aff'd, post, p. 606.
>
> But the statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Sedima, 473 U.S. at 496-97 (footnotes omitted). When the underlying RICO violation alleged is either section 1962(a), (b), or (c), the analysis is fairly straightforward. The simple act of discharging an employee as alleged in this case does not constitute

racketeering activity as defined in RICO, and thus does not fall within the definition of what the Supreme Court has termed "predicate acts" under RICO. See Shearin, 885 F.2d at 1167 ("[T]he Court specified 'predicate acts' to mean those included as racketeering activities in the catalogue of crimes found in section 1961(1)."") (citing [Sedima,] 473 U.S. at 495). Accordingly, as a matter of law, Bowman lacks standing to bring a "whistle blower" wrongful discharge suit under 18 U.S.C. § 1964(c) when the underlying RICO violation is based on § 1962(a), (b), or (c).

IV.

While Sedima determined that a civil action based on a violation of § 1962(c), a substantive RICO violation, must allege the commission of a predicate RICO act, the Court did not address the same question with respect to a civil action based on a § 1962(d) conspiracy claim.[2] As a result, the more difficult question is whether a plaintiff such as Bowman may sue under § 1964(c) when he alleges a conspiracy to violate RICO. Specifically, Bowman contends he suffered injury to his business or property as a result of a conspiracy on the part of Western Auto to violate RICO. See 18 U.S.C. § 1962(d).

Despite their agreement regarding civil actions based on violations of § 1962(a)-(c), the circuits disagree as to the requirements that must be met to establish standing to bring a

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[2]The plaintiff in Sedima also alleged a violation of § 1962(d), but the Court limited its standing analysis to the § 1962(c) claim. See Schiffels v. Kemper, No. 91-2706, 1992 U.S. App. LEXIS 27829, at *12-13 (7th cir. Oct. 27, 1992) ("the reason [that the Court's standing discussion did not directly address § 1962(d)] seems apparent: there was no need to address standing to raise a § 1962(d) claim, because if a plaintiff has standing to bring a § 1962(c) claim he necessarily has standing to raise a § 1962(d) claim.").

civil suit when the underlying violation is an alleged § 1962(d) RICO conspiracy claim. Some courts have held that in order to establish standing to recover civil damages in such a case, the act that caused the harm must be an act specifically delineated as a RICO predicate act in § 1961(1). See Miranda v. Ponce Federal Bank, 948 F.2d 41, 48 (1st cir. 1991) ("An actionable claim under § 1962(d), like one under section 1962(c), requires that the complainant's injury stem from a predicate act within the purview of 18 U.S.C. § 1961(1)."); Reddy v. Litton Industries, 912 F.2d 291 (9th Cir. 1990) (Conspiratorial act that causes the injury must be a predicate act as defined in § 1961 in order to satisfy standing requirement of civil RICO provision.); Hecht v. Commerce Clearing House, 897 F.2d 21 (2d Cir. 1990) (same). Other courts, however, have determined that the statute places no such limitation on civil RICO standing, and that so long as the overt act was done in furtherance of a conspiracy to violate RICO, the act need not be a § 1961(1) predicate RICO act. See Schiffels v. Kemper, No. 91-2706, 1992 U.S. App. LEXIS 27829, at *20-21 (7th Cir. Oct. 27, 1992) (Plaintiff who "alleges an injury to her business or property proximately caused by an overt act in furtherance of a conspiracy to violate RICO, even though the overt act is not a predicate act required in a RICO pattern," has standing.); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1169 (3d cir. 1989) ("[E]ither racketeering activity or classic overt conspiracy acts may qualify as 'predicate acts' to a RICO violation that causes injury.").

A nonconspirator cannot be injured in his or her business or property by a mere agreement to violate RICO, that is a RICO conspiracy in which no overt acts have been committed. Some overt act must therefore occur in order to establish civil standing based on § 1962(d). The Second Circuit reasoned accordingly that Congress must have intended "injury-causing overt acts" to

be the underlying basis for civil RICO standing. Hecht, 897 F.2d at 25. Because Congress targeted specific types of activity in the RICO statute, rather than "all unlawful acts," the court determined that the limiting factor must be that only harm from a § 1961(1) predicate act done in furtherance of a RICO conspiracy will suffice to establish standing. This approach, therefore, treats suits based on an alleged conspiracy to violate RICO in a similar manner to those suits based on substantive RICO violations. See, e.g., Miranda, 948 F.2d at 48.

The Seventh Circuit, on the other hand, has arrived at a different conclusion, finding nothing in the statute to suggest that application of the predicate act requirement to suits based on § 1962(d) was intended. Schiffels, 1992 U.S. App. LEXIS 27829. The Schiffels court reasoned:

> [S]ince RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiff's injury need not be a predicate act of racketeering. A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured "by reason of" the conspiracy. Since a conspiracy to violate RICO's substantive provisions is itself a violation of RICO . . . a person injured "by reason of" the conspiracy has been injured "by reason of" the RICO violation. That is all that § 1964(c) requires for standing to bring a civil RICO action.

Id. at *10-11. The court concluded that "[a]fter all, RICO, which grants standing to anyone injured in his business or property 'by reason of' a RICO violation, prohibits conspiracies, which do not require the commission of any predicate offenses." Id. at *18. The Seventh Circuit was satisfied that, by imposing a proximate cause requirement on standing in civil RICO, the Supreme Court had sufficiently restricted the scope of potential liability for RICO violators. Id. at *15-18 (citing Holmes v.

Securities Investor Protection Corp., 112 S. Ct. 1311 (1992)).

In Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311 (1992), the case upon which the Seventh Circuit relies to prevent civil RICO liability from being "unlimited," the Supreme Court addressed civil RICO Standing in the context of causation, that is the connection between the injury and the RICO act that allegedly caused it. Plaintiff Securities Investor Protection Corporation (SIPC) claimed defendant Holmes conspired in a stock manipulation scheme that resulted in two broker-dealers being unable to meet their obligations to their customers. As a result, SIPC's statutory duty to advance funds to reimburse the injured customers of the two broker-dealers was triggered. The Supreme Court held that the SIPC could not recover from Holmes under RICO.

According to the Supreme Court, although RICO could be read to require that a defendant's RICO violation be only a but-for cause of plaintiff's injury in order to establish standing under § 1964, Congress did not intend the provision to be read so expansively. Holmes, 112 S. Ct. at 1316-17. Instead, the Court adopted a proximate causation standard, which it borrowed from federal antitrust law. One of the "central elements" of proximate cause under antitrust has been the directness of the relationship between "the injury asserted and the injurious conduct alleged." Id. at 1318.[3] By applying a proximate cause requirement to civil RICO standing, the Supreme Court thus set

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[3]The reasons for including a directness element, according to the Court, are at least threefold. First, the less direct the relationship, the more difficult it is to determine how much of the damage is due to the alleged RICO conduct and how much to extraneous conduct. Second, courts may have significant difficulty apportioning damages among plaintiffs who are removed, in varying degrees, from the alleged injurious conduct. Third, the more directly an individual is injured, the more likely that individual will take on the role of private attorney general, and thus help uphold the law. Holmes, 112 S. Ct. at 1311.

limitations within which individuals and their harms must fall in order to establish standing. See Schiffels, 1992 U.S. App. LEXIS 27829.

We acknowledge the split among the circuits regarding standing to bring a civil RICO action based on a RICO conspiracy violation. We also recognize that Congress expressly prohibited a conspiracy to engage in a pattern of racketeering as well as a pattern of racketeering. Thus both the substantive acts and a conspiracy to commit them carry criminal sanctions for the perpetrator. We further are cognizant of the Supreme Court's language in Sedima supporting a broad reading of the RICO statute. Sedima, 473 U.S. at 497-98 ("RICO is to be read broadly . . . [and] is to 'be liberally construed to effectuate its remedial purposes.'") (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947). Indeed, in Sedima the Supreme Court reversed a too restrictive reading of the type of harm that must be alleged in order to establish standing.

At the same time, the Supreme Court itself has imposed limitations on standing by rejecting a but-for causation requirement and applying a more restrictive proximate causation requirement between the injury and the harm alleged. Holmes, 112 S. Ct. 1311. We therefore do not read an admonition to interpret RICO broadly as a requirement that we decline all opportunities to carefully delineate the types of plaintiffs who may validly bring a suit under RICO's civil enforcement provisions. Imposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute. While this might appear to collapse a civil RICO suit based on a § 1962(d) conspiracy into those suits based on substantive RICO violations as delineated in § 1962(a)-(c), any other result would render this decision merely a guide

to the artful pleader. A civil litigant, eager to collect treble damages under federal law (or to use the threat of those enhanced damages as bargaining leverage), rather than bringing a wrongful discharge claim in state court could circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts.

We hold that standing to bring a civil suit pursuant to 18 U.S.C. § 1964(c) and based on an underlying conspiracy violation of 18 U.S.C. § 1962(d) is limited to those individuals who have been harmed by a § 1961(1) RICO predicate act committed in furtherance of a conspiracy to violate RICO. Because Bowman, who contends that he was fired for protesting, speaking out against, and criticizing Western Auto's alleged double billing scheme, has not alleged such an injury, he lacks standing to bring this civil RICO action.

V.

The district court in this case based its decision upon what little Eighth Circuit precedent exists with respect to a private litigant's standing under RICO. While expressing doubts about the result, the lower court relied in large part on a App. 11Missouri district court case, Komm v. McFlicker, 662 F. Supp. 924 (W.D.Mo. 1987), in which a whistle blower was allowed to bring a civil RICO action. The Komm court had interpreted the Eighth Circuit case Terre Du Lac Ass'n Inc. v. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985), cert. denied, 475 U.S. 1082 (1986), as commanding this result.

In Terre Du Lac, this court held that a subdivision association had standing to recover civil damages under RICO. The Association had sued not on behalf of its members, but on its own behalf, alleging that defendant's mail fraud scheme

injured the Association by causing the cost of maintaining the roads within the subdivision to increase. This court stated "that standing to pursue a RICO action exists even though the plaintiff does not allege that it was a target of the racketeering activity and even though the plaintiff only alleges that it suffered indirect injury." Id. at 472 (citation omitted). The Komm court concluded, based on its reading of Terre du Lac, that this circuit was "holding firm in allowing RICO recoveries when the illegal conduct has indirectly harmed the plaintiff." 662 F. Supp. at 928 (citing Terre Du Lac, 772 F.2d at 473). As a result, the district court below decided, "despite [its] doubts," that plaintiff Bowman had standing to pursue a civil suit based on § 1962(a), (b), and (c) claims as well as on a § 1962(d) conspiracy claim. Because we find that the firing of Bowman from his job was not a predicate RICO act, neither our analysis of standing under § 1962(a)-(c) nor our analysis under § 1962(d) need address the issue of indirect injuries as discussed in Terre Du Lac. See Holmes, 112 S. Ct. 1311.

VI.

The order of the district court holding that plaintiff Bowman has standing to bring a civil action pursuant to 18 U.S.C. § 1964(c) based on alleged violations of 18 U.S.C. § 1962(a)-(d) is reversed. This case is remanded to the district court with directions to grant the defendant's motion to dismiss.

HEANEY, Senior Circuit Judge, dissenting:

Today the majority undermines the very policy behind the enactment of the RICO statutes. It is now the law of this circuit that an employee in a state such as Missouri has no protection should he or she choose to expose criminal activity on

the part of his or her employer. As I cannot join in this evisceration of Congress's purpose in enacting this legislation, I respectfully dissent.

I agree with the majority that the circuits have split on the question of standing to allege conspiracy under RICO, that Congress has expressly prohibited conspiracy to engage in racketeering, and that the Supreme Court and Congress have mandated that RICO be read broadly to achieve its remedial purposes. Supra at 9. Having acknowledged the proper context in which to construe RICO's provisions, the majority then determines that, as the Supreme Court has found a need to limit the scope of RICO in an entirely different context, we should likewise do so here.

Though I agree that RICO has been used more widely than Congress contemplated and than is desirable, that sentiment does not support the holding that, as a matter of law, an employee fired in furtherance of a conspiracy to commit one of the prohibited predicate acts has no standing to sue under RICO. Rather, the approach taken by the Seventh Circuit in Schiffels best accommodates both the need to limit RICO standing and the purposes that underlie the RICO statute.

In Schiffels, the plaintiff was fired for blowing the whistle on her superior's scheme to defraud the two mutual funds that were under his management. The district court dismissed her RICO claim "because she was not injured by any predicate act of racketeering." Schiffels, 978 F.2d at 347. The court of appeals reversed, holding that when an employee is injured by an act in furtherance of a conspiracy prohibited by RICO, that employee has standing to sue under section 1962(d). The court described that case as one

> in which an employee is fired to prevent the employee from causing the conspiracy to unravel by disclosing the scheme .

> . . [and in which] the employee has been directly injured by the defendant's RICO violation. Just as important, the act causing the injury has been committed to further the conspiracy and is directly related to the conspiracy's goals. This brings the injured employee well within the zone of interests RICO is meant to protect. After all, RICO, which grants standing to anyone injured in his business or property "by reason of" a RICO violation, prohibits conspiracies, which do not require the commission of any predicate offenses.

Id. at 351.

The Schiffels court then found that the pleadings in that case failed properly to allege harm to the plaintiff from actions that furthered the conspiracy, but remanded to allow amendment of the pleadings. It is unnecessary for this court to reach that question prior to remand. Bowman may not be able to prove that his firing took place in furtherance of a conspiracy to commit fraud, but he should be given that opportunity. A contrary holding assures employers that when troublesome employees threaten to disclose the commission of RICO violations, those employees can be threatened with termination to keep such violations hidden from public view. Such a reading of the RICO statute hardly complies with the Supreme Court's and Congress's mandate that RICO "'be liberally construed to effectuate its remedial purposes.'" Sedima, 473 U.S. at 498 (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947). Rather, the majority's holding ensures that fewer instances of fraud will be uncovered and that Congress's intent in enacting the RICO statutes will be frustrated.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISOURI
WESTERN DIVISION

RICHARD N. BOWMAN,

Plaintiff,

v.

WESTERN AUTO SUPPLY COMPANY and JOHN R. LEACH,

Defendants.

No. 90-0765-CV-W-9

RECEIVED
AUG 16 1991

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Plaintiff Richard N. Bowman (Bowman) has filed a five-count Complaint against Western Auto Supply Company (Western Auto) and one of its employees, John R. Leach (Leach). Plaintiff asserts he was wrongfully discharged from employment with Western Auto for complaining about its alleged practice of double billing merchandise suppliers for advertising. Plaintiff contends that Western Auto employees "conspired to conduct a scheme and conducted a scheme known as 'double billing' or 'double dipping'" by which merchandise suppliers "were fraudulently billed for advertising and promotional services that were never provided by Western Auto." First Amended Complaint at ¶ 14.

In Count V, plaintiff asserts a common law wrongful discharge claim. In Counts I through IV, plaintiff alleges

violations of 18 U.S.C. § 1962(a), (b), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act (RICO). RICO prohibits a person from employing a pattern of racketeering activity or from employing the proceeds derived from this activity so as to affect an interstate enterprise in one or more of three ways: 1) investing the income derived from a pattern of racketeering in the enterprise, § 1961(a); 2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering, § 1962(b); and 3) conducting the affairs of an enterprise through a pattern of racketeering, § 1962(c). Also, § 1962(d) prohibits conspiring to violate subsection (a), (b) or (c).

Defendants seek dismissal of the Complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. Defendants argue plaintiff's RICO claims should be dismissed because: 1) the injury alleged by plaintiff (discharge from employment for complaining about alleged RICO violations) is too remote to confer standing under §§ 1962(a), (b) and (c) and his allegations of conspiracy are insufficient to confer standing independently under § 1962(d); 2) Western Auto, as a RICO enterprise, is not distinct from the defendants; 3) the legitimate business activities of Western Auto and its merchandise suppliers (the Co-op and Extra Effort programs) do not constitute an "association-in-fact" enterprise; and 4) as a matter of law, a RICO conspiracy cannot exist between Western Auto and one of its employees, Leach.

Although defendants originally asserted that plaintiff's RICO claims should be dismissed because he did not plead mail fraud with sufficient specificity, they later abandoned this ground for dismissal.

Defendants argue that plaintiff's common law wrongful discharge claim must be dismissed because plaintiff does not allege that he was discharged for refusing to violate a statute, a

regulation based on a statute, or a constitutional provision.

I. Standard of Review

In Conley v. Gibson, the United States Supreme Court stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 78 S. Ct. 99, 102 (1957) (citation omitted). "A complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations." Bennett v. Berg, 685 F.2d 1053, 1057-58 (8th Cir. 1982), aff'd in part and rev'd in part, 710 F.2d 1361 (1983), cert. denied, 104 S. Ct. 527 (1983). "'Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982) (quoting Jackson Sawmill Co. v. United States, 580 F.2d 302, 306 (8th Cir. 1978)), cert. denied, 99 S. Ct. 839 (1979).

II. Standing

To meet the standing to sue requirement under RICO, a plaintiff must allege injury to his business or property "by reason of" unlawful predicate acts. 18 U.S.C. § 1964(c). The "by reason of" language "simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of § 1962 must, directly or indirectly, have injured the plaintiff's business or property. A defendant who violates § 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured."

Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 105 S. Ct. 3291 (1985). The issue of proximate causation is a question of law for the court, taking into consideration such factors as foreseeability of a particular injury, intervention of independent causes and the factual directness of the causal connection. Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir. 1988) (citation omitted).

Defendants contend that, as a matter of law, the alleged illegal RICO activity is not the proximate cause of Bowman's discharge. A number of courts have considered whether an employee who is discharged from his employment for complaining about or reporting illegal acts by his employer has adequately pled facts to establish standing under RICO. Defendants cite an impressive array of decisions from other jurisdictions which hold that a discharged employee does not have standing to sue under RICO because the RICO activity was not the proximate cause of the discharge. These courts have found the act of whistleblowing, not the illegal RICO activity, to be the cause of the employee's injury. Reddy v. Litton Industries, Inc., 912 F.2d 291 (9th Cir. 1990); O'Malley v. O'Neill, 887 F.2d 1557, 1562 (11th Cir. 1989), cert. denied, 110 S. Ct. 2620 (1990); Burdick v. American Express Co., 865 F.2d 527, 529 (2d Cir. 1989); Cullom v. Hibernia National Bank, 859 F.2d 1211, 1215 (5th Cir. 1988).

Plaintiff acknowledges these authorities but points out that the Eighth Circuit Court of Appeals takes a contrary view. In Komm v. McFlicker, 662 F. Supp. 924, 927-28 (W.D. Mo. 1987), Judge Sachs considered whether a whistle blower has standing to sue under RICO when the whistle blower's discharge is only indirectly caused by the conduct alleged to be illegal under RICO. Relying on Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 772 F.2d 467, 472-73 (8th Cir. 1985) (citation omitted),

cert. denied, 106 S. Ct. 1460-61 (1986), Judge Sachs stated that "the Eighth Circuit seems to be holding firm in allowing RICO recoveries when the illegal conduct has indirectly harmed the plaintiff. . . . Therefore, although plaintiff does not claim that he was terminated for refusing to act illegally . . . he does now allege a claim for which he could apparently receive relief in the Circuit under RICO." Komm v. McFlicker, 662 F. Supp. at 928.

I, too, am bound to follow the guidance of the Eighth Circuit Court of Appeals despite my doubts. Thus, plaintiff has standing to bring § 1962(a), (b) and (c) RICO claims. Because plaintiff's discharge is not too remote to confer standing under these RICO provisions, he also has standing to bring his § 1962(d) conspiracy claim.

III. Separateness of Defendants from the Enterprise

RICO prohibits a person from using a pattern of racketeering activity or the proceeds derived from this activity to affect an enterprise in the ways prohibited under § 1962. A person "includes any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). The persons or defendants in this action are Western Auto and Leach. An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Plaintiff alleges there are two enterprises in this case: 1) Western Auto; and 2) "[t]he legitimate business activities of Western Auto and its merchandise suppliers, including the Co-op and Extra Effort programs." First Amended Complaint at ¶¶ 10-11.

A. Section 1962(c) Claim

Section 1962(c) applies only to "any person employed by or associated with any enterprise" and makes it unlawful for such a person "to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." Most courts have held that in a RICO violation based on § 1962(c), the same individual or entity may not be alleged as both the liable person (the defendant) and the enterprise (the victim) "since it makes little sense to speak of a person being 'employed' by himself or victimizing himself." J. S. Rakoff and H. W. Goldstein, RICO Civil and Criminal Law and Strategy, § 105[3], Exhibit A, Suggestions in Support of Defendants' Motion to Dismiss. The Eighth Circuit Court of Appeals requires that the enterprise be distinct from the person in § 1962(c) RICO claims. Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 995 (8th cir. 1989); Bennett v. Berg, 685 F.2d at 1061-62.

Accordingly, plaintiff cannot bring a § 1962(c) claim against Western Auto in which Western Auto also is alleged to be the enterprise.

Plaintiff argues that he can bring a § 1962(c) RICO claim against Western Auto because he has alleged the existence of an "association in fact" enterprise distinct from Western Auto itself. This enterprise involves the joint effort of Western Auto and its merchandise suppliers, including the Co-op and Extra Effort programs, to promote the resale of the suppliers' products through Western Auto's retail stores. First Amended Complaint at ¶¶ 9-10. Defendants argue that "the association-in-fact alleged by plaintiff is, on its face, insufficient under Eighth Circuit RICO law." Reply Suggestions at 10.

An association-in-fact is defined as "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An association-in-fact must exhibit each of

the following characteristics: 1) a shared or common purpose; 2) a continuity of function; and 3) an ascertainable structure distinct from the pattern of racketeering activity itself. Atlas Pile Driving Co., 886 F.2d at 995-96 (citations omitted); United State v. Bledsoe, 674 F.2d 647, 664-65 (8th Cir. 1982), cert. denied, 103 S. Ct. 456 (1982). In regard to the third characteristic of an association-in-fact enterprise, the Eighth Circuit Court of Appeals has held that the enterprise must be substantially different from the acts which form the pattern of racketeering activity. United States v. Anderson, 626 F.2d 1358, 1365 (8th Cir. 1980), cert. denied, 101 S. Ct. 3743-44 (1981).

Plaintiff has adequately alleged an association-in-fact enterprise. Plaintiff has alleged a shared purpose between Western Auto and its merchandise suppliers. "Western Auto and its merchandise suppliers at all relevant times herein were associated in a joint effort to market and promote the resale of the merchandisers' products through Western Auto's retail stores." First Amended complaint at ¶ 9. Plaintiff has alleged that the Extra Efforts and Co-op programs functioned as continuing units during the period of years in which the pattern of racketeering activity allegedly occurred. Id. Plaintiff also has alleged that the Co-op and Extra Effort programs had an ascertainable structure distinct from the pattern of racketeering activity. The Co-op and Extra Effort programs are the "legitimate business activities of Western Auto and its merchandise suppliers" that involved a "joint effort to market and promote the resale of the merchandisers' products through Western Auto's retail stores." Id. These legitimate activities are distinct from the alleged pattern of racketeering that involved the "repeated acts by Western Auto, Leach and other employees over a period of years, the number of which is not known to plaintiff, of sending fraudulent bills to merchandise suppliers." First

Amended Complaint at ¶ 16.

Because plaintiff has adequately pled the existence of an association-in-fact enterprise separate from Western Auto itself, plaintiff may bring a § 1962(c) RICO claim against Western Auto. Because Leach is separate both from Western Auto and the Extra Effort and Co-op programs, plaintiff may bring a § 1962(c) RICO claim against him.

B. Section 1962(a) and (b) Claims

Sections 1962(a) and (b) do not apply only to a person "employed by or associated with" an enterprise. Accordingly, most courts have held that the person (defendant) and the enterprise do not have to be distinct in RICO claims brought under these two sections. J.S. Rakoff and H.W. Goldstein, RICO Civil and Criminal Law and Strategy at § 1.05[3], Exhibit A, plaintiff's Suggestions in Opposition to Defendants' Motion to Dismiss. In Haroco, Inc., 747 F.2d at 402, the Seventh Circuit Court of Appeals considered the difference between § 1962(a) and (c) claims.

> Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it.

Subsection (b) also does not contain language requiring that the person be employed by or associated with an enterprise. Subsection (b) prohibits a person from acquiring an interest in an enterprise through a pattern of racketeering activity. In Liquid Air Corp. v. Rogers, 834 F. 2d 1297, 1307 (7th cir. 1987), cert. denied, 109 S. Ct. 3241 (1989), the Seventh Circuit Court of Appeals stated:

> Whether a single entity may be both a liable 'person' and 'enterprise' under subsection (b) depends on whether the language of subsection (b) is more like (a) or (c). . . . We can see no distinction between 'investing in an enterprise' and 'acquiring an interest in an enterprise' sufficient to require separate entities for a subsection (b) violation. Unlike subsection (c), which requires a relationship between the 'person' and the 'enterprise' (employer-employee), subsections (a) and (b) require only the use of an 'enterprise' by a 'person.' Accordingly, we hold that, like subsection (a), subsection (b) does not require the existence of an enterprise separate and distinct from the person sought to be held liable.

Accord, Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 529 (9th Cir. 1987), aff'd, 81 F.2d 522 (1987). See also Bumgarner v. Blue Cross & Blue Shield of Kansas, Inc., 716 F. Supp. 493, 501 (D. Kan. 1988).

The Eighth Circuit Court of Appeals has not addressed the issue of whether the enterprise must be distinct from the person in § 1962(a) and (b) claims. In Bennett v. Berg, 685 F.2d at 1060 n. 8, the court stated that "[b]ecause we conclude that appellants have stated a claim under § 1962(c), we do not reach the question whether claims may also be stated under subsections (a) and (b)."

Because subsections (a) and (b) do not contain the requirement of subsection (c) that the person be employed by or

associated with the enterprise and because the majority of circuit courts that have considered this issue have concluded that the person does not need to be distinct from the enterprise in subsection (a) and (b) claims, I conclude that, absent contrary authority from the Eighth Circuit Court of Appeals, plaintiff is not precluded from bringing § 1962(a) and (b) claims against Western Auto in which Western Auto also is alleged to be the enterprise.

IV. RICO Conspiracy Claim

Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Defendants argue that a RICO conspiracy claim cannot be brought when the conspiracy is alleged to exist between a corporation and one of its employees. "Because the Complaint merely attempts to allege a conspiracy between Western Auto and its officer/employee John Leach, the conspiracy claim must be dismissed." Suggestions in Support of Motion to Dismiss at 16.

District courts are split on the issue of whether corporate officers and employees can conspire with their corporate employer to violate the RICO statute. For cases allowing RICO intra-corporate conspiracy theories, see Pandick, Inc. v. Rooney, 632 F. Supp. 1430, 1435-36 (N.D. Ill. 1986); Callan v. State Chemical Mfg. Co., 584 F. Supp., 619, 623 (C.D. Ill. 1984); Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1307 n.9 (D. Colo. 1984); Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983). Contra, see Lawartz v. Bank of Nova Scotia, 653 F. Supp. 1278, 1287 (D.V.I. 1987) (collecting cases).

The Seventh Circuit Court of Appeals is the only appellate circuit that has considered the issue of whether corporate officers

and employees can conspire with their employer to violate the RICO statute.[1] In Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th cir. 1989), the court stated:

> The plaintiffs respond in kind, citing footnote 22 in Haroco, Inc., 747 F.2d 403, where this court distinguished the Supreme Court's disapproval of antitrust intracorporate conspiracies in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L.Ed.2d 628 (1984), from conspiracies alleged under RICO. In Haroco, Inc., we noted that Copperweld Corp. at least in an alleged conspiracy between a parent corporation and its wholly-owned subsidiary, 'does not extend to RICO's provisions in 18 U.S.C. § 1962(c) primarily because the Sherman Act is premised, as RICO is not, on the basic distinction between concerted and independent action.' 747 F.2d at 403 n. 22 (citing Copperweld Corp., 467 U.S. at 769, 104 S. Ct. at 2740).' Since a subsidiary and its parent theoretically have a community of interest, a conspiracy 'in restraint of trade' between them poses no threat to the goals of anti-trust law--protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.

Based on the rationale of the Seventh Circuit Court of Appeals in Ashland Oil, I conclude, absent contrary authority from the Eighth Circuit Court of Appeals, that plaintiff has state a claim upon which relief can be granted pursuant to 18 U.S.C. § 1962(d). Moreover, plaintiff also has alleged that a conspiracy existed between Leach and other individual employees, not simply Leach and his employer Western Auto.

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[1]In Shearin v. E. F. Hutton Group, Inc., 885 F.2d 1162, 1166-67, the Third Circuit Court of Appeals held that a corporation could conspire with its wholly owned subsidiaries to violate the RICO statute.

In his Suggestions in Opposition, plaintiff cites to material outside the pleadings. Rule 12(b), Federal Rules of Civil Procedure, provides in part that "if, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgement and disposed of as provided in Rule 56. . . ." Because I did not consider the matters outside the pleadings presented by plaintiff, defendants' motion regarding plaintiff's § 1962(d) claim was not treated as a summary judgment motion.

V. Missouri Common Law Wrongful Discharge Claim

Missouri recognizes a public policy exception to the employment-at-will doctrine.

> To be sustainable as an actionable claim for wrongful discharge, an employee suing under the public policy exception to the employment-at-will doctrine must allege an prove that conduct required of him by the employer would have amounted to a violation of a statute, constitutional provision or regulation adopted pursuant to a statute, and also that his discharge was attributable to a refusal to perform the unlawful act or his performance of a mandated lawful act contrary to the directions of his employer.

Crockett v. Mid-American Health Services, 780 S.W.2d 656, 658 (Mo. App. 1989).

Plaintiff alleges defendants' conduct violated statutory provisions. In ¶ 15 of his First Amended complaint, plaintiff alleges that acts carried out in the double dipping or double billing scheme violate the United States Mail Fraud statute, 18 U.S.C. § 1341, and constitute racketeering activity as defined by 18 U.S.C. § 1961(1). In ¶ 16, plaintiff alleges that these repeated

acts constitute a pattern of racketeering activity as defined in § 1961(5). Plaintiff alleges that this pattern of activity is a violation of the RICO statute. In ¶ 31 of the First Amended Complaint, plaintiff alleges that the double dipping or double billing scheme "was against public policy and a violation of the criminal statutes of the United States and the State of Missouri."

However, plaintiff does not allege specifically that he was discharged for refusing to participate in the double billing scheme but, instead, for protesting defendants' acts. In ¶ 34, plaintiff alleges that "[s]ubsequent to his protest of the 'double billing' or 'double dipping' policy and because of this conduct, plaintiff was wrongfully discharged from his employment with Western Auto in violation of the public policy and common law of the State of Missouri."

Defendants argue that plaintiff's wrongful discharge claim must fail, as a matter of law, because he does not allege that he was discharged because he refused to take part in the double billing scheme. Plaintiff asserts that "[a]lthough his First Amended complaint does not use the phrase, 'refused to perform the double billing scheme,' because he was Director of Retail Advertising, his protest against it constituted a refusal to perform any job duties that included, whether direct or through the supervision of others, the continuation of the scheme." Suggestions in Opposition at 17.

"the public policy exception to the employment at will doctrine is narrow, and a plaintiff who seeks to come within its scope must expressly plead that his employer has discharged him because of his refusal to violate the law." Crockett v. Mid-America Health Services, 780 S.W.2d at 658 (citations omitted). Because plaintiff has not expressly pled that he was discharged because he refused to participate in the double billing scheme, he has not state a wrongful discharge claim upon which relief

can be granted under Missouri law. However, before Count V is dismissed, I will afford plaintiff an opportunity to seek leave to amend the allegations of Count V.

VI. Conclusion

Accordingly, it is ORDERED that:

1) defendants' Motion to Dismiss Counts I, II and IV is denied;

2) defendants' Motion to Dismiss Count III is denied with the exception that plaintiff cannot bring a § 1962(c) claim against Western Auto in which Western Auto also is alleged to be the enterprise;

3) within 15 days from the date of this order, plaintiff may seek leave to amend his wrongful discharge claim. If plaintiff does not do so, Count V will be dismissed pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure; and

4) within 30 days from the date of this order, the parties shall submit a Joint Proposed Scheduling Order that complies with Local Rule 15.

D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
August 16, 1991.

Supreme Court, U.S.
FILED
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No. 92-1636

In The

Supreme Court of the United States

October Term, 1992

RICHARD N. BOWMAN,

Petitioner,

vs.

WESTERN AUTO SUPPLY COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondents respectfully suggest that the issue framed by petitioner is more accurately stated as follows:

> Does a discharged employee who fails to allege that his discharge was the result of a RICO predicate act set forth in 18 U.S.C. § 1961 nevertheless have standing to sue his employer under RICO for the discharge simply by alleging that the discharge was an overt act in a RICO conspiracy?

RULE 29.1 STATEMENT

Respondent Western Auto Supply Company, a Delaware corporation, is a wholly owned subsidiary of Sears, Roebuck and Co.

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REASONS FOR DENYING THE WRIT

I. THE CONFLICT ALLEGED BY PETITIONER DOES NOT REQUIRE THE COURT'S ATTENTION.

Petitioner attempts to portray the conflict in the circuits on the issue he presents as more severe than it really is. Petitioner's issue – whether a discharged employee can recover for the discharge under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), simply by alleging the discharge was an overt act in a RICO conspiracy – has now been addressed, directly or indirectly, by eight circuits. The circuits, including the Eighth Circuit below, appear to be resolving this issue in a nearly uniform way. The one apparent exception to these uniform decisions, an opinion last year by the Seventh Circuit, was interlocutory in nature and should not support a grant of certiorari in the present case.

The Court has denied certiorari twice in the last two terms on the identical issue petitioner now raises. It denied certiorari last term in *Reddy v. Litton Indus., Inc.*, 112 S.Ct. 332 (1991). At the time of that denial, a clear majority position was developing in the circuits, a position that the Eighth Circuit followed in the case below. That majority position, which has now been expressly adopted by four circuits and tacitly by at least two more, is that in order to maintain a RICO conspiracy action based on an employment termination, the employee must allege more than that the termination was an overt act in a RICO conspiracy – he must allege that the discharge resulted from one of the RICO predicate acts set out in 18

U.S.C. § 1961.[1] This same issue – whether a discharged employee must allege injury from a RICO predicate act in a RICO conspiracy case – was most recently presented to the Court in a certiorari petition filed March 2, 1993, which the Court denied on April 26, 1993. *See Haviland v. J. Aron & Co.*, 986 F.2d 499 (2d Cir. 1992), *cert. denied*, 61 U.S.L.W 3635 (U.S. April 26, 1993).[2]

The RICO conspiracy issue presented by petitioner is closely related to an issue on which the circuits have uniformly *agreed*: whether a terminated employee has standing to challenge the termination as a substantive RICO violation under 18 U.S.C. § 1962(a)-(c). Every circuit that has considered this latter issue has concluded that a terminated employee lacks standing because the termination is not caused by any of the RICO predicate

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[1] A person may bring a civil RICO action if he is "injured in his business or property by reason of a violation of section 1962" of Title 18. 18 U.S.C. § 1964(c). Subsections (a)-(c) of section 1962 set out substantive RICO violations, while section 1962(d) makes it a separate violation to conspire to violate subsection (a), (b) or (c). Each of the substantive RICO violations in subsections (a)-(c) of section 1962 requires a pattern of "racketeering activity"; "racketeering activity" is in turn defined in section 1961 as any one of a number of listed predicate acts. 18 U.S.C. §§ 1961; 1962 (a)-(c).

[2] The *Haviland* issue on which the Court denied certiorari on April 26, 1993 was framed as follows:

> Whether a conflict among the Circuit Courts of Appeal – as to whether a RICO conspiracy plaintiff has standing to sue if he is injured not by a predicate act of racketeering but by an overt act in furtherance of the conspiracy – should be resolved by this Court?

Petition for a Writ of Certiorari at i, *Haviland v. J. Aron & Co., cert. denied*, 61 U.S.L.W. 3635 (No. 92-1438).

acts listed in 18 U.S.C. § 1961. *See Nodine v. Textron, Inc.*, 819 F.2d 347, 348 (1st Cir. 1987); *Burdick v. American Express Co.*, 865 F.2d 527, 529 (2d Cir. 1989); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1167-68 (3d Cir. 1989); *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1215 (5th Cir. 1988); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 154 (6th Cir. 1990); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir. 1993); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 322 (1991); *O'Malley v. O'Neill*, 887 F.2d 1557, 1562 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

The rationale for these unanimous holdings on RICO claims brought under 18 U.S.C. § 1962(a)-(c) is that there is no causal connection between the employee's termination and any activity RICO was designed to deter, a connection required by the Court's opinion in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985).[3] The courts of appeals have uniformly recognized that a terminated employee is injured not by any prohibited RICO predicate act, but by the termination itself:

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[3] The Court has recently emphasized that RICO activity must be the *proximate* cause of a plaintiff's alleged injury in order to support recovery. *See Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992). Contrary to the vague allegations in Point II of the petition, there is no direct conflict between the circuits over the application of *Holmes* to employee termination cases. If anything, the fact that the Court's opinion in *Holmes* is so recent is a ground for *denying* certiorari in the present case so as to give the circuits a full opportunity to consider and apply the *Holmes* principles on RICO standing to employee terminations.

> Because the injury complained of here – [the plaintiff's] loss of employment – was not the product of bribery or any other predicate crime . . . but of her dismissal, the injury cannot be said to have occurred "by reason of" a RICO violation. Put another way, a claim for wrongful discharge cannot be successfully pursued under civil RICO when the injury itself is not the result of a predicate act.

Miranda v. Ponce Federal Bank, 948 F.2d 41, 47 (1st Cir. 1991).

Petitioner now argues that, notwithstanding the above unanimous authority on RICO substantive violations, the circuits are split on whether a terminated employee states a RICO claim merely by alleging that the termination was an overt act in a RICO conspiracy. It is undisputed that the clear majority of circuits that have considered petitioner's issue have recognized that in order to recover under the RICO conspiracy provision, 18 U.S.C. § 1962(d), a terminated employee must still have been injured as a direct result of a RICO predicate act. Four circuits have expressly so held. *See Miranda*, 948 F.2d at 48; *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990); *Bowman*, 985 F.2d at 387; *Reddy*, 912 F.2d at 294-95.[4] As the Eighth Circuit noted below:

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[4] Three more circuits have affirmed dismissals of complaints that appear to have included RICO conspiracy claims in addition to substantive RICO claims on the ground that the terminated employees lacked standing to sue, although the circuits did not specifically discuss standing under section 1962(d). *See Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211, 1213, 1218 (5th Cir. 1988); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d

> [A]ny other result would render this decision merely a guide to the artful pleader. A civil litigant . . . rather than bringing a wrongful discharge claim in state court could circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts.

985 F.2d at 388.

Petitioner points to two decisions he claims create a conflict with the clear majority rule that the Eighth Circuit followed below: the Third Circuit's decision in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989), and the Seventh Circuit's more recent opinion in *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344 (7th Cir. 1992). On examination, these cases do not create the absolute conflict that petitioner claims. The *Shearin* decision is distinguishable on its facts. The *Schiffels* opinion, while facially inconsistent, was an interlocutory decision that remanded to allow plaintiff to file an amended complaint. The interlocutory nature of the *Schiffels* decision does not create the kind of immediate conflict that should warrant the Court's present intervention.

The *Shearin* case was decided by the Third Circuit before the Court denied certiorari in *Reddy*; in fact, the alleged conflict in the circuits that *Shearin* supposedly caused was expressly considered by the Court at that time. *See Reddy*, 112 S.Ct. 332 (White, J., dissenting). The

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1175, 1178-79 (7th Cir. 1989); *Morast v. Lance*, 807 F.2d 926, 932-33 (11th Cir. 1987).

Shearin case was distinguishable then, and remains distinguishable today, so that *Shearin* does not contribute directly to the conflict petitioner alleges.[5]

The Seventh Circuit's decision last year in *Schiffels* admittedly conflicts, at least facially, with the majority position of the circuits, including the Eighth Circuit's opinion below. But the broad language of *Schiffels* must be read in context. The *Schiffels* court's pronouncements on RICO standing were made in the course of remanding to grant the plaintiff leave to amend her complaint:

> The defendants raise other deficiencies in Schiffels' complaint that we need not detail. Suffice it to say that as it now stands, Schiffels' complaint is subject to dismissal under Fed.R.Civ.P. 12(b)(6) [sic] does not adequately set forth that she was directly injured by a conspiracy to violate RICO. However, because the district court incorrectly held that only injuries directly resulting from predicate acts are sufficient to

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[5] The First Circuit in *Miranda* noted that *Shearin* was factually distinguishable from "whistleblower" cases such as the present one. *Miranda*, 948 F.2d at 48 n.9. The plaintiff in *Shearin*, unlike employees in typical "whistleblower" cases, was hired specifically for the purpose of filling an employment position that was a "front" for, and thus essential to, a RICO conspiracy. *Shearin*, 885 F.2d at 1168. Because the *Shearin* plaintiff's very employment position was part of the RICO conspiracy, firing her when she refused to cooperate was of necessity also essential to the ongoing conspiracy. *Id.* There are no such specific allegations in the present case. Here plaintiff alleges that his termination was the result of his attempt to act as a whistleblower. Unlike the plaintiff in *Shearin*, he does not, and cannot, claim that his own employment position was in any way essential to a RICO conspiracy.

> confer standing to sue for a conspiracy to violate RICO, it did not consider the sufficiency of Schiffels' complaint or give her an opportunity to amend. * * * Since Schiffels did not have an opportunity to amend her complaint in the district court, we will remand this case to the district court to give her that opportunity.

Schiffels, 978 F.2d at 353-54.

The Seventh Circuit was by no means confident that the *Schiffels* plaintiff could successfully state a claim for RICO conspiracy on remand:

> Schiffels thus has standing to sue under RICO if her complaint alleges an injury to her business or property proximately caused by an overt act in furtherance of a conspiracy to violate RICO, even though the overt act is not a predicate act required under RICO pattern. *This presupposes that Schiffels has properly alleged a conspiracy to violate RICO in the first place.*

978 F.2d at 351 (emphasis added).

The *Schiffels* court then noted that: "We agree with the defendants that Schiffels' complaint is deficient in several respects." *Id.* at 352. The most obvious deficiency was that the alleged conspiracy to cover up a RICO violation by terminating the whistleblowing employee was not necessarily a conspiracy to violate RICO:

> A conspiracy to cover up a past RICO violation is not necessarily a conspiracy to violate RICO, because the conspiracy to cover up does not necessarily include an agreement to the commission of a pattern of predicate acts.

Id. Thus the *Schiffels* court recognized that not every allegation of RICO conspiracy will suffice to give a terminated employee RICO standing, and it specifically recognized that the plaintiff before it might be unable to state a RICO conspiracy claim. Until the *Schiffels* complaint is amended and finally reviewed on appeal, it is difficult to tell precisely what the scope of the Seventh Circuit's ultimate holding may be.[6]

The rule ostensibly announced in *Schiffels* should be tested in a more concrete factual setting before it is held up as being absolutely in conflict with the position developed by the remaining circuits on the issue petitioner raises. On remand, it may develop that the *Schiffels* plaintiff is in a position analogous to the plaintiff in *Shearin*, in that she was actually participating directly through her terminated employment position in the challenged RICO conduct. More likely, as the *Schiffels* panel acknowledged, 978 F.2d at 352-53, the *Schiffels* plaintiff may be unable to connect her termination to any RICO conspiracy. Indeed, it is difficult to see in the abstract how a terminated employee who is not injured by a RICO violation under § 1962(a)-(c) could ever be proximately injured simply by

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[6] It is not even clear that *Schiffels* represents the Seventh Circuit's position on the use of RICO conspiracy claims in employee terminations. In its earlier decision in *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175 (7th Cir. 1989), a case that involved allegations under both § 1962(c) and (d), the Seventh Circuit found that a discharged employee lacked standing because his termination was not caused by the alleged RICO conduct. *Id.* at 1179. The *Schiffels* panel acknowledged this potential conflict within the Seventh Circuit itself. *Schiffels*, 978 F.2d at 351 n.2.

a conspiracy to violate those same sections. The facts in *Schiffels* may be clarified on a subsequent appeal; until then, the alleged "conflict" may be more apparent than real, and the Court need not intervene.

The courts of appeals should in any event be given further opportunity to resolve any conflict in light of the Court's guidance in recent RICO cases. In addition to its decision adopting a proximate cause standard in *Holmes*, the Court recently warned against using RICO's "liberal construction" clause as "an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 61 U.S.L.W. 4207, 4211 (U.S. March 2, 1993). The *Schiffels* court had expressly *relied* on this same "liberal construction" clause to support its interlocutory decision. 978 F.2d at 350. The Seventh Circuit should be given the chance to consider these emerging principles on final review of the *Schiffels* case before this Court concludes that certiorari is necessary.

The Court has already denied certiorari twice on the same issue now raised by petitioner. The most recent denial was less than three weeks ago, when the identical conflict raised in this case was also present. Last year's interlocutory decision in *Schiffels* – the lone decision that appears to diverge from the clear majority of circuits – should not support certiorari unless, after final disposition of that case, it becomes apparent that a conflict truly exists.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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